(2)

No. 92-495

FILED
OCT 20 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES T. GREEN AND
KAY E. GREEN, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, when a loss is erroneously reported on the return of a Subchapter S corporation, and that loss "passes through" to the return of certain shareholders (with whom an extension of the period of limitation has been duly executed), the loss may be disallowed on the shareholders' return *after* the limitations period for assessing tax against the corporation has expired.

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-495

CHARLES T. GREEN AND
KAY E. GREEN, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioners correctly note (Pet. 6) that this case presents the same question presented in *Bufferd* v. *Commissioner*, 952 F.2d 675 (2d Cir.), cert. granted, No. 91-7804 (June 22, 1992). Both in this case and in *Bufferd* the courts of appeals concluded, correctly in our view, that when a loss is erroneously reported on the return of a Subchapter S corporation, and that loss "passes through" to the return of an individual shareholder (with whom an extension of the period of limitation has been duly executed), the loss may be disallowed on the shareholder's return even *after* the limitations period for assessing tax against the corporation has expired (Pet. App. 7a-17a; 952 F.2d at 676-678). The same conclusion

was also reached by the Eleventh Circuit in *Fehlhaber* v. *Commissioner*, 954 F.2d 653 (1992).

The Court granted certiorari in *Bufferd* to resolve the conflict between that decision and the contrary holding of the Ninth Circuit in *Kelley* v. *Commissioner*, 877 F.2d 756 (1989). Argument in the *Bufferd* case is scheduled for November 30, 1992.

The petition in this case should be held pending the Court's decision in *Bufferd* v. *Commissioner*, No. 91-7804, and disposed of as appropriate in light of that decision.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

OCTOBER 1992